No. 9668

United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Appellant,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of Roberta Doheny, Deceased,

Appellee.

and

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

Appellant,

vs.

ETHEL M. DOHENY, as Administratrix of the Estate of Marguerite Doheny, Deceased,

Appellee.

Upon Appeal from the District Court of the United States for the District of Montana

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PETITION FOR REHEARING

Filed .....

..... Clerk

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In The

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UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,

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Appellee.

PETITION FOR REHEARING

Comes now the United States Fidelity and Guaranty Company, appellant in the above entitled cause, and by and through its attorneys undersigned, respectfully moves the Court to vacate its decision in the above entitled case dated and filed November 17, 1941, and to grant appellant a rehearing upon said cause upon the following grounds and for the following reasons:

I.

That the majority opinion predicates liability of the

appellant under the contractor's public liability policy upon the theory of equitable estoppel.

The complaint pleads and relies upon the contractor's public liability policy (Tr. p. 5, 6 and 29) and expressly pleads the provisions of the policy (Tr. p. 6, 7 and 30) and pleads compliance with all the requirements and conditions precedent in the policy (Tr. p. 32).

The answer specifically and affirmatively pleads the material exclusion in the policy (Tr. pp. 55, 56 and 59). No reply was filed.

The decision of the appellate Court recognizes the validity of the exclusion but holds it inoperative because of estoppel. The doctrine of estoppel appears for the first time in the decision of the Court.

Rule 8(c) of the Rules of Civil Procedure for the District Courts of the United States provides:

> "AFFIRMATIVE DEFENSES. In pleading to a preceding pleading, a party shall set forth affirmatively . . . estoppel . . . and any other matter constituting an avoidance or affirmative defense."

Rule 12(h) of the Rules of Civil Procedure for the District Courts of the United States provides:

> "WAIVER OF DEFENSES. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, . . ."

Rule 15(b) of the Rules of Civil Procedure for the District Courts of the United States provides:

> "AMENDMENTS TO CONFORM TO EVIDENCE. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; . . ."

Appellant contends that the doctrine of equitable estoppel is based upon these elements: (1) A case where one, by his conduct has misled another, with (2) the intention or expectation that the conduct will be acted upon by the other party who (3) must in fact rely upon the fact indicated by such conduct, (4) to his disadvantage.

Rehearing should be granted because:

A. The plaintiffs in these actions did not plead or rely on an estoppel and, having failed to do so, waived the right to rely thereon, and that no proof of estoppel was offered or made or any amendment made to the pleadings, and defendant had no opportunity at any time, at the trial or on appeal to defend against estoppel.

B. In the majority opinion reference is made to the fact that there was no showing that the policy written by the appellant was a standard form in general use or that policies written by concerns engaged in writing

public liability insurance on behalf of contractors commonly contain exclusion clauses comparable with the one in this case. Appellant respectfully contends that such a showing could and would have been made if the issue of estoppel had been raised by the pleadings or proof, and because of the far-reaching effect of this decision it is respectfully requested that a rehearing be granted and that if appellee is entitled or permitted to rely upon estoppel that the cause be remanded for the taking of further evidence.

II.

That the decision of the Court abrogates freedom of contract by holding that the appellant may not insert exclusions in its contractor's public liability policy issued by it to Coverdale & Johnson. That the Court's holding in this respect further disregards the provisions of section 8140 of the Revised Codes of Montana, 1935, which states:

> "Where a peril is specially excepted in a contract of insurance, a loss, which would not have occurred but for such peril, is thereby excepted; although the immediate cause of the loss was a peril which was not excepted."

III.

That the decision in this case results in the modification of a written contract by invocation of the doctrine of estoppel in that the exclusions in the public liability policy were held not to be applicable.

Appellant respectfully contends that while written

contracts may be held to be modified by existing statutes, or by rules and regulations made by a public board in pursuance of statutes authorizing such rules and regulations, there is no such statute and there are no such rules and regulations in Montana. Appellant therefore respectfully contends that this decision has the far-reaching effect of modifying written contract by law without basic legislation requiring such modification. A rehearing is respectfully requested so that this matter may be presented to the Court.

IV.

The decision of the Court refers to the intent of the State of Montana and particularly the intent of the Highway Commission of the State of Montana in requiring the contractors Coverdale & Johnson to carry public liability insurance and the Court concludes and assumes what form the State of Montana and the Highway Commission of Montana intended the contractor's public liability policy to follow.

That in assuming what was the intention of the State of Montana and the Highway Commission of the State of Montana as to the form of the policy and the terms of the policy the decision disregards the evidence of the witness Whipps, Secretary and Administrative Engineer of the State Highway Commission of the State of Montana, who stated, "The State Highway Commission, since 1929, has never prepared or had prepared a form of public liability insurance policy for

use by contractors under such contracts and the Commission has never prescribed the terms of the form of such policies to be executed under such standard provision as paragraph 7.11 of the standard specifications." (Tr. 115, 116)

V.

The decision in this case grants to any member of the public the right to have a written contract judicially modified by invocation of the doctrine of estoppel, and this, notwithstanding the fact that such individual was not a party to the contract, and the decision further grants such right, notwithstanding the fact that no plea of estoppel was made in the pleadings and no opportunity given the appellant to defend against estoppel. That the decision further grants such right notwithstanding the fact that there is no statute and there are no public rules or regulations upon which a member of the general public might rely as a basis for modification of the contract.

VI.

In view of the far-reaching effect of this decision and in view of the fact that the decision in this case is of the utmost importance to this appellant as well as to the general public and to all companies or persons engaged in the writing of surety bonds and contractor's public liability policies in the United States, and in view of the fact that the decision in this case is without

direct precedent in law, and because the decision itself presents questions and issues which appear therein for the first time in this case, and because of the grounds and reasons hereinbefore set forth in the other paragraphs in this motion, it is most respectfully requested that a rehearing be granted herein.

Howard Poole

W. F. Loos

Attorneys for the Appellant.

CERTIFICATE

We, Howard Toole and W. T. Boone, Attorneys regularly admitted to practice in the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify that in our judgment the foreging Petition for Rehearing in the consolidated cases of United States Fidelity and Guaranty Company, a corporation, Appellant, vs. Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, Appellee, and United States Fidelity and Guaranty Company, a corporation, Appellant, vs. Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, Appellee, No. 9668, is well founded in law and in fact and that it is not interposed or presented for the purpose of delay.

Howard Toole

W. T. Boone

Dated this 12 day
of December, 1941.